

10 Ellicott Square Court Corporation d/b/a Ellicott Development Square and Service Employees Local 200C, AFL-CIO, CLC. Cases 3-CA-18734 and 3-CA-18735

January 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issues presented for Board review are whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing bargaining proposals, previously made to the Union, in retaliation for the filing of unfair labor practice charges, and by conditioning the execution of a collective-bargaining agreement with the Union upon the Union withdrawing its charges; that the Respondent violated Section 8(a)(3) and (1) of the Act by denying a pay raise to, suspending, extending the suspension of, and discharging an employee because of her support of the Union or other protected concerted activity; and that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities.¹ The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, 10 Ellicott Square Court Corporation d/b/a Ellicott Development Company, Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ On September 28, 1995, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Michael Cooperman, Esq., for the General Counsel.
Daniel P. Forsyth, Esq. (Flaherty, Cohen, Grande, Randazzo & Doran), of Buffalo, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by Service Employees International Union, Local 200C, AFL-CIO, CLC (the Union), the Regional Di-

rector for Region 3 issued a complaint and notice of hearing, alleging that 10 Ellicott Square Court Corporation d/b/a Ellicott Development Company (Respondent) has violated Section 8(a)(1), (3), and (5) of the Act. The trial with respect to the allegations raised by the complaint was heard before me in Buffalo, New York, on May 10, 11, and 12, 1995.

Briefs have been filed by the General Counsel and Respondent, and have been carefully considered. Based on the entire record,¹ including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with an office and place of business in Buffalo, New York (Respondent's facility), where it is engaged in the management and rental of office buildings, including complexes located in Buffalo, New York, and known as 295 Main Street, 290 Main Street, and 270 Michigan Avenue. Annually, Respondent derived gross revenues in excess of \$100,000 of which an amount in excess of \$25,000 was derived from the New York State Department of Environmental Conservation, the New York State Department of Labor, and the New York State Department of Motor Vehicles, each of which is directly engaged in interstate commerce. Annually, Respondent also purchased and received at its Buffalo, New York facilities products, goods, and materials value in excess of \$5000 directly from points outside the State of New York. It is admitted and I so find, that Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent provides building management services for the owners of seven office buildings in Buffalo, New York, including a building located at 295 Main Street (the Ellicott Square building), a facility at 270 Michigan Avenue (270 Michigan), whose sole tenant is the New York State Department of Environmental Conservation (the DEC), and a building located at 290 Main Street, also known as the Swan Tower.

Each of the buildings referred to above, are owned by separate holding companies, with Respondent performing the leasing and management services for all. The Union has been the collective-bargaining representative for Respondent's employees employed at Ellicott Square in separate bargaining units of janitorial and of maintenance employees for many years. In December 1993, after a card count conducted by the New York State Labor Relations Board, Respondent voluntarily recognized the Union as the representative of its janitorial employees in separate units of employees employed at 270 Michigan and at Swan Tower. Although negotiations

¹ Although every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony. Therefore, any testimony in the record that is inconsistent with my findings is discredited.

commenced shortly thereafter, and have been conducted since that time, as of the close of the instant hearing, no collective-bargaining agreement had been reached between the parties.

At some point undisclosed by the record, Carl Paladino, president and chief executive officer of Respondent, received complaints that a representative of the Union, Bill Covington, had been bothering some of Respondent's employees, by among other things pretending to be Paladino or other of Respondent's supervisors, in order to get employees to come to the phone. Accordingly, Paladino made a complaint to Edward McGrath, business representative of the Union, and requested that Covington be kept away from Respondent's buildings as well as its employees. He also did not want Covington to participate in any negotiations or other dealings with Respondent with respect to any of its properties. McGrath apparently consented to Paladino's request, and agreed that either he or Dina Fox, another union representative, would be the sole union officials with respect to dealing with Respondent.

On December 20, 1993, the Union filed a charge against Respondent with the Board in Case 3-CA-18294, alleging that Respondent violated Section 8(a)(1) and (3) of the Act, by refusing to provide a Christmas bonus to the employees employed at Ellicott Square. After being informed that the Region intended to dismiss the charge, the Union requested withdrawal of its charge, which request was approved by the director on January 31, 1994.² Meanwhile the parties were engaged in negotiations for renewal contracts for the janitorial and maintenance units of employees at Ellicott Square. On May 25, tentative agreement was reached with respect to both units, and on June 1, Paladino executed and forwarded to the Union copies of contracts that he believed were agreed on. By letter dated June 3, McGrath on behalf of the Union indicated that Paladino had omitted one sentence from the agreement, which according to McGrath should have been included. Thus, McGrath requested that Paladino make the requested change and forward copies of the new page, and McGrath would then have both agreements signed and returned. On June 15, however, McGrath sent a letter to the Region, with a copy to Paladino, stating that the Union wished to refile the attached unfair labor practice charge, which was the identical charge filed in December 1993, and withdrawn in January 1994. According to McGrath he attempted to refile the charge, because the 6-month statute of limitations was about to expire, and he had been told at the time of the withdrawal that he could refile within 6 months.

The Region would not accept the refiling as attempted by the Union, however, because it was necessary to file a new charge with a new original signature. By this time, according to McGrath the statute of limitations had expired, and he decided not to pursue the matter any further. Paladino though was not informed about McGrath's change of heart, and he admittedly had a "big reaction" to the attempt to refile the charge. According to Paladino he felt that the Union was acting in bad faith and was being unethical by refiling the charge, because McGrath had allegedly promised during negotiations to withdraw the charges. Therefore Paladino wrote a letter to the Union, dated June 17, referring to the fact that the Union had attempted to refile the charges, and that since

the Union had not executed or returned the previously agreed-on contracts, Respondent was withdrawing its offer to settle the contracts as agreed on, and demanded that the Union return the signed copies to Respondent. By letter dated June 22 to the Region, copy to Paladino, McGrath stated that the Union wished to withdraw its request for a refiling of the prior charge. This action apparently did not satisfy Paladino, and he wrote to the Union, dated June 24. In this letter, Paladino asserts that his view of contract law is that there can be no contract until it is signed and delivered, and that because Respondent had previously terminated its offers, there was no agreement with respect to either unit. The letter goes on to say that,

we will hold an employee meeting at some time in the proximate future with appropriate counsel to discuss with them your activities in connection with the negotiations of this contract and especially your highly questionable and unethical conduct with reference to the filing of an unfair labor practice. It was our understanding that claim was withdrawn with prejudice in light of our payment to our janitorial people of their Christmas bonuses.

Sometime in July, the Union published a newsletter, in which Paladino was accused of being "a man who has no problem with stepping on the toes of low wage workers to get his way." It also asserted that Paladino "has been harassing union members in an effort to break their union and to prevent them from helping to organize his nonunion buildings downtown. Last year he tried to deny Christmas bonuses to union members, but the union leafleted the Ellicott Square building to inform his tenants of what a 'scrooge' he was. The janitors got their bonuses the next day." Finally the leaflet mentioned that the janitors at Ellicott Square would be wearing union T-shirts to work to show their unity, and may also "resort to leafleting Paladino's buildings again to get him to behave." On July 29, Paladino sent two identical letters to McGrath with respect to 270 Michigan and Swan Group, concerning which negotiations were then in progress. These letters, after discussing the state of negotiations, criticized the remarks made by the Union in its July newsletter, characterizing the Union's attitude as "negative," and asserting further that "we expect the union representatives to maintain a higher standard of ethics and to refrain from degradation, slandering and otherwise misrepresenting or lying, about the position of management during the course of and subsequent to our negotiations." These letters concluded with a reminder that only McGrath and Fox would be allowed in Respondent's properties on union matters, a reference to the previously mentioned insistence by Paladino that Union Representative Covington not be permitted to deal with Respondent or appear at its facilities. Paladino also wrote identical letters to McGrath dated August 1, which referenced the Ellicott Square contracts for the two units. These letters traced the history of the parties negotiations, and Respondent's withdrawal of its contract offers because the Union sought to refile its previous charges with respect to the employee bonuses. Paladino characterized the Union's conduct as a "breach of ethics and a breach of the understanding made by you that the issue was closed." The letter further asserts

² All dates hereinafter, unless otherwise indicated are in 1994.

that "the timing of the filing was purposely orchestrated by the union subsequent to the completion of maintenance contracts at the Ellicott Square so as to harass and intimidate management. It is our understanding that the filing was made without consultation or the knowledge or approval of the union stewards or any of the employees in the bargaining group." The letter then indicates that Respondent was ready to execute both contracts for both units, "upon receipt from the union and/or other appropriate party of written assurance that the union has withdrawn its Unfair Labor Practice Charge with prejudice." The letter also includes the identical comments made by Paladino in his July 29 letters to the Union with respect to the other buildings, concerning Paladino's opinions of the union newsletter.

On August 3, McGrath on behalf of the Union wrote a letter to Respondent. In this letter, McGrath protested Paladino's characterization of the Union's attitude as negative. On August 5, McGrath wrote another letter to Respondent in reply to Paladino's August 1 correspondence, in which McGrath disputed several of Paladino's contentions. For example McGrath denied that the Union's prior charges were withdrawn with prejudice, and that there had been any prior discussion with Paladino concerning the issue of the refiling of unfair labor practice (ULP) with regard to Christmas bonuses. McGrath also asserted that the timing of the filing related to the 6-month statute of limitations, and criticized Paladino for questioning union members about whether the Union consulted with employees, as well as observing that such conduct by Paladino might be an additional ULP charge. McGrath also enclosed a copy of the Union's withdrawal of its Christmas bonus ULP, and asserted that Respondent's attempt to tie in the withdrawal of ULP charges with the signing of a collective-bargaining agreement, very well could be construed as an additional ULP. With respect to the union newsletter, McGrath questioned what Paladino took exception to, and asked for examples of the negative union attitude that McGrath allegedly telegraphed during the negotiations.

Paladino replied by letter dated August 8, wherein he continued to insist that the Union had promised to withdraw its charges with prejudice, and accused the Union of subterfuge by refiling the charges. Paladino added that Respondent would not receive and or acknowledge contracts until Respondent received a withdrawal "[w]ith prejudice," of the ULP charges. Additionally Paladino made reference to the allegedly disgusting and derogatory statements made in the Union's newsletter. Although the record does not reflect whether or not the Union furnished to Respondent the requested withdrawal with prejudice, Respondent and the Union subsequently reached agreement on contracts covering both units of employees at Ellicott Square as of August 24.

Sometime in late May or early June, Michael Walden served on jury duty and did not receive payment by Respondent for this period of time. As Walden was aware that another employee had received payment for jury duty service from Respondent, he complained to McGrath about the manner. McGrath, in turn spoke to an official of Respondent about Walden's problem. By letter dated June 20 Respondent by Paladino responded to McGrath's complaint. Paladino asserted that the contract has no provision for jury duty pay, and since Walden's shift did not start until 5 p.m., state law does not require any additional payments to Walden.

Paladino explained that the payment to the other employee was an oversight, and was an unauthorized payment. McGrath replied by letter of June 22, and stated that Paladino was correct that there is no jury duty provision in the contract. Thus McGrath stated that Walden had been compensated properly, and that McGrath had made an error in assuming that the contract contained such a clause. McGrath subsequently informed Walden that the complaint had no merit, and that the Union considered the matter closed. In Paladino's letter to McGrath, however, dated June 24, referred to above, wherein he discussed various subjects, he also made reference to Michael Walden's situation. Paladino confirmed that the Union, by its letter of June 22, was accepting the fact that Walden was asking for benefits in excess of what he was entitled to under the contract, and that he was pressuring Respondent as union steward for special treatment, which Respondent had no intention of giving him.³ Walden discussed the problem with his wife Lisa, who still felt that it was unfair for Respondent not to pay Michael Walden for his jury duty, since it had paid another employee in similar circumstances. Michael also discussed the subject with his mother-in-law Shirley Jones, who agreed with her daughter Lisa that Respondent was being unfair to Michael.

On June 6 McGrath sent a letter to Respondent designating Lisa Walden as shop steward for the 290 Main Street and 270 Michigan Avenue buildings. Paladino responded by letter of June 9 in which he stated that Respondent does not recognize Lisa Walden as a union steward for "290 Main Street." Paladino explained that these properties are owned by different entities, and that Ellicott acts as payroll agent for these entities. Thus, Paladino asserted that one property has nothing to do with the other. The letter continues that Lisa Walden works at 270 Michigan Avenue and if she is the duly elected representative of employees at that property, Respondent will recognize her as the union steward for purposes of that representation. Paladino adds that she does not work at 290 Main Street and that Respondent will not recognize her as a representative of the employees at 290 Main Street. McGrath responded by letter of June 14, wherein he explained that since both buildings were small, he felt that appointing Walden as shop steward for both buildings was a courtesy to Paladino, since he would not be burdened by a large number of stewards. McGrath further asserted that he did not care about the fact that the properties were different entities or that Ellicott was a payroll agent. McGrath stated, however, that if Paladino did not want to recognize Lisa Walden as the steward for 290 Main Street, he would appoint another steward for that property. With respect to Paladino's comments about Lisa Walden being the duly elected representative, McGrath asserted, "that is not your prerogative." McGrath continues that the appointment of shop stewards is covered by the Union's constitution and by-laws, and just as it is none of the Union's business to determine who Respondent's corporate officers are, "it is none of your business in determining who our union stewards are. Lisa Walden is the union steward for 270 Michigan Ave-

³ Michael Walden was one of the shop stewards at Ellicott Square. He had not participated, however, in the filing of any grievances while in this position. In fact, according to Paladino, the Union never filed any grievances against Respondent, and he always had an excellent relationship with the Union and its stewards.

nue.” The Union never appointed another shop steward for 290 Main Street.

On June 16, Barbara Jurynec, Respondent’s payroll and personnel clerk, received a memo from Rose Dzieciuch (Rose), Lisa Walden’s supervisor indicating that Lisa had reported an injury to her on May 25. Jurynec wrote a memo dated June 16 to Rose, Don Shepard, and Paul Moretta. This memo reported the fact that Rose had submitted her memo on June 16 relating to an alleged accident on May 25, and criticized the fact that the report from Rose had not been submitted in a timely manner. A copy of this memo was sent to Paladino, who in turn wrote on the memo that Jurynec should schedule a meeting with Walden and that the accident should be investigated, and the carrier told that Respondent did not have evidence that this was an “on the job” injury. Jurynec did not schedule a meeting with Walden as instructed by Paladino, since Walden filed another accident report on June 22. This report alleged that Lisa Walden had injured her back on the job. Although Rose did not see the accident, she did confirm that there was a mark on Lisa’s back. In Jurynec’s memo she recounts the events of the accident, and adds that she had spoken to Rose and Rose “feels that Lisa is so tired from taking care of the baby that maybe she is not being as careful as she used to be.” A copy of this memo was sent to Paladino, as well as Marie Mauro, Respondent’s vice president of administration and assistant to Paladino. Mauro wrote on the memo that she spoke to Jurynec and Walden would be out of work for 1 day, that Respondent requested a doctors note from her, and that she intended to investigate the incident. Paladino also wrote on the memo instructing his employees to follow up and to “tell them the whole story.” Thereafter Mauro and Jurynec investigated the incident by testing the door where Walden allegedly was injured. They concluded as a result of their investigation that Walden could not have been injured in the manner that she described in her report. A memo was submitted by Mauro to Paladino relating the results of this investigation, and concluding that Walden probably got hurt before she came to work. Based on this report, Respondent sent a letter dated June 27 to its insurance company, wherein it disputed that the injury could have resulted from the description of the accident that Walden had given. Walden had previously submitted to Respondent as ordered, a doctor’s note dated June 23 that confirmed that Walden had a lower back strain and could return to work on June 27. This doctor’s note was submitted to the insurance company along with Respondent’s letter.

In June 1994, Lisa Walden was the only janitorial employee employed at Michigan Avenue who did not receive a wage increase. When she found out that all of these other employees had received increases, Walden asked Jurynec if she could see her personnel file to see when she last received a raise. Jurynec informed Walden that she would check with Paladino to see if Walden could see her file. Jurynec did inform Walden that she had last received a wage increase in June 1993. Jurynec wrote a memo to Paladino dated June 30 relating Walden’s request to see her personnel file. Paladino wrote “no” on this memo.

On June 29 Shirley Jones (as noted above Jones is the mother of Lisa and mother-in-law of Michael Walden) had a telephone conversation with Kathy Zielinski who is the sister of Jones and was also at the time dating Don Shepard,

as noted, a supervisor of Respondent. Jones complained to Zielinski that Respondent was being unfair to Michael Walden concerning his jury duty pay and to Lisa Walden concerning her wage increase. Jones asked Zielinski to speak to Shepard and request that he intercede on behalf of Michael and Lisa with Respondent concerning these problems. Zielinski reported this conversation to Shepard, and told Shepard to do what he waned. Zielinski also told Shepard that Jones intended to call Paladino personally about these matters. Shepard, in turn reported to Mauro that Jones intended to call Paladino about the issues of jury duty pay for Michael and Lisa Walden’s wage increase. Shepard also told Mauro that Jones was “going to give Carl a piece of her mind.” Mauro immediately reported the above to Paladino. Paladino asked Mauro who Shirley Jones was? Mauro explained the relationship between Jones and the Waldens. Paladino asked Mauro why Jones wanted to speak to him? She replied that it had to do with Michael Walden’s jury pay. Paladino responded that he thought that was a dead issue. At that point Paladino instructed Mauro to have the Waldens report to his office.

Mauro arranged for Michael Walden to report to the office of Paladino at approximately 3:15 p.m. Paladino began the meeting by asking Walden what his mother-in-law has to do with how Paladino pays Walden for jury duty? Walden replied that he did not know. Paladino then said, “Who the fuck is your mother in law?” Walden replied Shirley Jones. Paladino then asked Mauro if Jones was the person who was going to call him to discuss the matter of jury duty pay. Walden informed Paladino that he knew nothing about his mother-in-law calling Paladino, and as far as Walden was concerned the matter was settled. Paladino then asked Walden whether his mother-in-law and his wife ran his life, and whether he can stand on his own two feet? Walden replied yes he could stand on his own two feet, and his wife and his mother-in-law do not run his life. Paladino asked Walden if his wife or mother-in-law would have an effect on his work, and whether Paladino was going to get 100-percent work from Walden. Walden answered, “I guess.” Paladino persisted and stated, “yes or no.” Walden responded yes. Paladino also inquired of Walden whether he received any pay from the Union for being shop steward? Walden replied that if this is so he was missing something. Paladino then instructed Walden that he was a union steward and if he had a problem he should come and speak to Paladino about it, and to tell his mother-in-law to mind her own business. Additionally Paladino asked Walden if he had any discussions with McGrath about unfair labor practice charges. Walden replied that he had not had any such discussions. Paladino also asked Walden whether or not he had spoken with McGrath about the refiling of the unfair labor practice charge, and whether Walden knew anything about such charges. Walden replied that he was not aware of the charges, and he had not discussed the matter with McGrath.

After Michael Walden left the office of Paladino, Lisa Walden was called into the office. The meeting began with a discussion of Lisa’s employment history with Respondent. Paladino then asked Walden why her mother, Shirley Jones, had a problem with the way Paladino paid Michael for jury duty. Lisa replied that her mother did not have a problem with how he paid Michael for jury duty. Paladino told Lisa that he had been informed that Jones had an argument with

Don Shepard about the subject of Michael's jury duty, and she intended to call Paladino and talk to him about it. Lisa responded that she did not know what Paladino was talking about, but that her mother did have an argument last night with her sister Kathy Zielinski, who is dating Shepard. Paladino instructed Walden that if she had any further problems to see him personally about them, and to tell her mother to mind her own business.

Paladino asked Walden why she wanted to see her personnel file. She replied that she wanted to know when was the last time that she had a raise. Walden also stated that she heard that everybody else received a raise, and she was the only one who did not receive an increase. Paladino explained that Lisa had a higher rate of pay than the other employees at 270 Michigan, and received the same rate as her supervisor, Rose. Lisa said that she felt that she did more work than Rose, and that she felt she was entitled to a raise. Paladino also told Lisa that she had been tired lately, and that there were some problems with her work. Walden denied that she was tired, or that there were problems with her work. Paladino referred to the fact that she had taken a couple of days off the previous week to take care of her baby. Lisa replied that her days off were caused by the accident that occurred with the crash bar. Mauro at that point stated that Lisa could not have been hit in the back with the crash bar, and that Mauro had investigated the incident. Lisa told Mauro that she must have looked at the wrong door, because it did in fact hit and injure her. Walden added that she was not lying, and she was sorry that Respondent did not believe her. Paladino asked Walden if she liked working for him? She replied yes. Paladino suggested that he might transfer Lisa to the Ellicott Square building, since this was a union location, and she would be able to receive more money, plus better supervision. Walden told Paladino that she did not wish to work at Ellicott Square because her husband works there, as well as other of her relatives.

During the course of the meeting, Paladino informed Walden that he had a letter stating that she wanted to be shop steward for 290 Main Street and 270 Michigan. Paladino asserted, "where do you get off saying that you can be union steward for 290." She told Paladino that she was asked to be steward for both buildings and she accepted, since there were only a couple of employees in each building, and the Union wanted one steward. Paladino asked who had asked Walden to be steward? Walden replied Ed McGrath. Paladino told Walden that she would never be the union steward for 290 Main.

Paladino informed Walden that he would reevaluate her performance in the next 30 days and review her at that time. Paladino again indicated that he might transfer Walden to Ellicott Square so that she could have the opportunity to make more money, and where she might receive better supervision. Walden responded negatively to this suggestion, and insisted that she did not want to work in the same location as her husband. Paladino replied that he did not care what Walden wanted, and he was the boss, and she would work where he designates. At that point, Walden became upset and began to cry. Paladino concluded the meeting by telling Walden that if she had any further problems concerning the matters that had been discussed during the meeting, she should speak with either him or Mauro about these subjects. He also specifically told Walden that she was not to

speak to any other supervisors of Respondent about these matters.

My findings above with respect to the meetings with the Waldens are based on a compilation of the credited testimony of Paladino, Mauro, and the Waldens as well as notes taken of these meetings by Mauro. Most of the events at both meetings are largely not in dispute, although the sequence of the various subjects discussed varied considerably among the witnesses. The only matters of significance that are in dispute involve whether Walden was crying when she left the meeting, and whether Paladino gave Lisa Walden specific instructions not to discuss any of the subjects of the meeting with any supervisors of Respondent other than Mauro or Paladino himself. With respect to the latter issue, I have credited the mutually corroborative testimony of Paladino and Mauro, particularly since Walden admitted that she had received such instructions from Paladino in a subsequent hearing before the unemployment compensation board, and in the meeting of June 30. As to the issue of Lisa's crying, I have credited Lisa that she did leave the meeting in that state. I note in this regard that McGrath testified that Lisa was crying when he spoke to her on the phone shortly after the meeting ended. Moreover, Walden's emotional reaction while testifying in this proceeding concerning the subject of her transfer leads me to believe that she reacted similarly when Paladino insisted on his right to transfer her with or without her consent.

Immediately after the termination of the meeting, Lisa Walden approached Don Shepard. She spoke to Shepard in front of other employees and raised her voice during the conversation. Walden questioned Shepard concerning whether he had said anything to Paladino concerning deficiencies in her work, or her mother calling Paladino, or concerning her workers' compensation claim. Shepard denied any involvement in these matters, and denied speaking to Paladino about these subjects. Walden did not believe Shepard's denials, and called him a liar. Shepard continued to deny any conversations with Paladino concerning the matters that Walden mentioned. Walden concluded the conversation by accusing Shepard of thinking everything "is a joke." Shepard, thereafter wrote a memo concerning his conversation with Walden, and submitted it to Mauro.

Meanwhile Walden discussed her meeting with Paladino with McGrath. Because she was crying and upset, McGrath suggested that she call in sick. Walden called the receptionist and indicated that she was sick and would not be at work. The receptionist immediately notified Mauro who in turn informed Paladino that Walden had just called in sick. Paladino said to Mauro that Walden was not sick, and he wanted her "to cool down a little bit." Therefore he instructed her to suspend Walden for 1 day. At that time Paladino had not seen the memo from Shepard, and was not aware of the conversation between Shepard and Walden.

The next day, July 1, Walden was instructed to report to Mauro before she commenced work. At that time Mauro handed Walden a written disciplinary report, which indicated that she was suspended for "unexcused absence." The report detailed that Walden was not sick during the meeting, and did not mention during the meeting that she was not feeling well. Walden told Mauro that Mauro knew that she had been upset and that she was "crying." Walden said that she was so upset that her whole body was shaking and she could

hardly talk. Mauro replied that this is what Carl wants. Walden refused to sign the report, but she was permitted to write her comments on the document. She wrote that she refused to sign the report because she would not have been able to perform her job right because she was so upset.

After Lisa was informed about the suspension, she proceeded to 270 Michigan and gave Rose her key to the "slop" room, since he was going to be on vacation the next week. After giving Rose the key, Lisa questioned Rose regarding the accident report, and claimed that Rose knew that there was more information written on the form than Lisa had been allowed to see. Lisa also told Rose about the remarks of Paladino that Lisa might be transferred to Ellicott Square where she could receive better supervision.

Rose reported her conversation with Lisa to Shepard. Shepard then proceeded to write a memo of the conversation as reported to him by Rose. The memo states that Lisa questioned Rose concerning the accident and wanted to see a copy of same. Lisa, according to the memo, questioned the contents being changed after Lisa had viewed it. Lisa explained to Rose that Paladino had suggested that Lisa be moved to Ellicott Square where she would be better supervised. Lisa also told Rose that Paladino had stated that Lisa had been tired and was not performing her work up to standard, which made Rose feel that she was not performing her job as required. The memo concludes by stating that if there are a further questions please contact Rose. Shepard gave this memo to Mauro.

On July 5, Respondent sent a memo to Lisa extending her suspension until July 20, when she will meet with Paladino to discuss her future employment with Respondent, and "for me to make a determination as to whether we will keep you in our employ and where you will work." The memo states that subsequent to the conversation between Lisa and Paladino, she took it upon herself to "interrogate and chew out your supervisor." The memo adds that Paladino had advised Lisa that any further problems that she might have with her employment should be directed directly to Paladino, and that he had also been informed that the investigation of her injury on the job was the result of his instruction and not that of any other person on the staff. Additionally the memo refers to Lisa having called in sick, though she had not demonstrated any apparent illness during the meeting, which resulted in her suspension for 1 day. The memo continues that Lisa apparently took it upon herself to go to 270 Michigan and "chew out and interrogate the lead lady, your direct supervisor." Lisa was advised in the memo that her actions were "totally unacceptable and will not be tolerated." After announcing the extension of her suspension, the memo states that pending the July 20 meeting with Paladino, she was not to have any contact with any supervisors and or employees on the job, and to refrain from entering the properties at 270 Michigan or any of Respondent's properties unless prior permission has been obtained from Mauro or Paladino.

Meanwhile, on July 1, Lisa after her discussion with Rose, went to the office of Joanne Middagh, an employee with the DEC, one of the tenants in the building. Lisa asked Middagh if she thought that Lisa was deficient in her work, and told Middagh that Paladino was thinking of transferring her to another building. Middagh offered to write a letter to Paladino on behalf of Lisa, and Lisa agreed. Middagh subsequently sent a letter to Paladino dated July 1. In this letter, which

was also signed by another employee of the DEC, it was stated that the signatories had heard that Lisa might be transferred to another building. The letter then goes on to praise the work of Lisa and concludes by requesting that Paladino reconsider her transfer and permit Lisa to remain working at the DEC.

On July 6, Lisa, accompanied by her husband and her infant son, returned to 270 Michigan to pick up some Avon orders and a copy of the letter from Middagh to Paladino. Lisa used her security code to enter the office through a secured door rather than using the public door to the building. Lisa met with Middagh and the other employee who signed the letter, and picked up the Avon orders. Lisa then proceeded to the cafeteria where she encountered Rose and showed Rose her baby. Rose was not aware at that time that Lisa was not allowed in the building, so she did not confront Lisa about her appearance in the building. Rose did inform Shepard that she had seen Lisa in the building, and Shepard informed Rose that Lisa had been suspended, and was not supposed to be in any of the buildings. On leaving the cafeteria, Lisa and her family went to the office of Maureen Brady, an attorney for the DEC on the third floor. Lisa showed Brady her baby, and asked Brady whether she thought that Lisa's work was deficient. Lisa also showed Brady the letter that had been sent by Middagh on her behalf to Respondent. Brady read the letter and asked if Lisa would like her to write a letter as well. Lisa replied that she would appreciate it, and Brady subsequently wrote a letter to Respondent on her behalf as well as five other employees in the department, in which they praised the work performance of Lisa.

When Lisa returned home on July 6, she found the July 5 memo from Paladino. This was the first time that she became aware that Respondent had ordered her not to enter company property. The next day, July 7, Lisa called Mauro and asked whether the memo was legitimate, since it was not on company letterhead. Mauro told Lisa that the memo was from Paladino. Lisa responded that it was all "lies," and denied that she had yelled at Shepard or interrogated Rose. Lisa informed Mauro that she intended to call Rose and ask Rose about the allegation. Mauro instructed Lisa to leave everyone alone and to wait until she spoke with Paladino on July 20. Lisa replied that she could do whatever she wants to on her own time, and she was going to call Rose at home. Mauro responded that with her attitude and "snappiness," she should not call Mauro any longer. Lisa did not call Rose on the phone subsequent to her conversation with Mauro. During this conversation, Lisa also asked Mauro why she had not gotten paid for the sick day. Mauro replied that she did not know, but that she would check on the matter.

On July 7, Paladino sent another memo to Lisa. The memo stated that Paladino had been informed that despite being warned, Lisa had gone to 270 Michigan, and it is a rule and regulation of the business that the tenants of Respondent are not to be solicited by employees of Respondent. The memo also states that Paladino had been informed that Lisa visited 270 Michigan apparently selling Avon products to tenants. This according to the memo was again a violation of company rules. The memo concludes by stating, "you are to refrain from entering any of our properties or soliciting any of our tenants in their work offices at any time."

On receiving a memo from Mauro concerning her conversation with Lisa, Paladino wrote another memo to Lisa dated July 8. This memo referred to the conversation with Mauro, and stated that Lisa's attitude with reference to incidents of the past week was unacceptable. The memo continues that she had been cautioned in the past, and she was being cautioned again, "for the last time," that any further contact with employees or supervisors of Respondent with reference to the continued employment with Respondent was forbidden. The memo also states that she was to see Paladino if she had a problem, and that he expected to see her at the meeting on July 20. Moreover Paladino indicated that he was instructing his supervisors that any additional incidents involving Lisa contacting them at home or anywhere were to be reported to Paladino.

On July 11 Lisa, despite having received the memos from Respondent, again returned to 270 Michigan to pay for the Avon order that she had picked up on July 6. Accompanied by her mother and baby, she again used her code to enter through the secured door, to the office of Middagh, where she encountered Rose who was also buying Avon products. Lisa testified that she was used to going in that way and that she didn't "think about" the memos she had received from Paladino. Rose told Lisa that she was not supposed to be in the building. Lisa paid for the Avon order and left. Rose reported the incident to Shepard, who in turn forwarded another memo to Paladino.

Sometime prior to July 20, Lisa notified McGrath about the July 5 memo and the July 20 meeting with Paladino. Respondent had never notified McGrath or the Union about the various disciplinary actions against Lisa. McGrath informed Lisa that he would attend the July 20 meeting. McGrath did attend the meeting, along with Lisa, Paladino, and Mauro. Paladino began the substantive portion of the meeting by asking Lisa if she recalled being instructed that any further discussions with reference to employment matters that had been discussed at the June 30 meeting were to be conducted with Paladino. Lisa replied that she did so recall. Paladino then asked Lisa what she did immediately after leaving his office? Lisa admitted that she had spoken to Shepard and asked him what he had told Paladino. Paladino confirmed that Lisa had spoken to Shepard even though she had been instructed that any further discussions about employment matters were to be with either Paladino or Mauro. Paladino then asked Lisa about having spoken to Rose, and asked if she had a discussion with Rose? Lisa replied that she had simply given Rose the key, and had not had any discussions with Rose at that time. After a discussion of how many times Lisa had entered 270 Michigan subsequent to June 30, Lisa was asked and confirmed that she had received the memo from Respondent dated July 5. Lisa stated that after receiving this memo she had only entered 270 Michigan on one occasion in order to give the money for Avon. McGrath then entered the conversation, and made the point that Paladino was in Italy, and Lisa could not obtain permission to enter the building from him, and that she had been told by Mauro not to speak to Mauro. This comment led to a discussion of the conversation between Lisa and Mauro, during which Mauro admitted telling Lisa not to call her. Mauro had mentioned that Lisa had insisted on her right to call Rose on her own time. Lisa admitted that she had said that to Mauro, but added that she in fact did not call Rose. McGrath then stated

that he thinks that it would be useful to analyze what caused "all of this." Paladino stated that he was not interested in analyzing. McGrath then asked why they were having a meeting? Paladino responded, "we are having this meeting so I can tell Lisa that she is discharged from her employment with our company." He then stated that he would finish explaining why she was being discharged. Paladino then mentioned the fact that she had brought her mother into the building, and that she had discussions with employees of the DEC concerning her employment with Respondent. Paladino stated that Lisa had done so despite two warnings from him that he was not to talk to anyone about her employment situation. Lisa responded that she had the right to fight for herself, and that Respondent was criticizing her work and had suspended her and she didn't do anything wrong. Paladino then explained that Lisa had a personality problem in dealing with her supervisors, and that she was talking to employees of tenants, causing these people to be distracted from their employment responsibilities, "so as to appease your self concerns and self interest. Which I find totally unacceptable. You tend to not only disregard instructions of supervisors, but you tend to become argumentative with them, you tend to want to run the show yourself. That is unacceptable to me." McGrath asked, "When did all this start?" Paladino replied, "This started I guess most recently when she decided to become involved in the issue which involved her husband concerning being paid for jury duty time." McGrath then interjected that Lisa had not been involved in the jury duty problem, and that he had been deeply involved in that problem and had not had any conversation with Lisa on that issue. Paladino replied, "She made herself involved in it." After McGrath discussed Lisa's exemplary record over 4-1/2 years, Paladino replied that the most disturbing feature of her employment was her "complete disregard for any type of authority. She feels compelled to have to go and confront her supervisors in public forums in front of other people and in an intimidating fashion." McGrath then asked if everything occurred after her suspension? Paladino responded that Lisa was originally suspended after she refused to go to work when she was perfectly healthy. Then he claimed that he suspended Lisa for a week and a half when he found out that she violated a direct instruction that he had given her. McGrath referred to Lisa's record that indicated that she had only two writeups, the last one being 2 years ago for using the telephone, and that she then requested to see her personnel file. McGrath asserted that Lisa was entitled to see her personnel file, adding that she was entitled to verify that she was the only employee not to receive a raise. Paladino replied that Lisa was under investigation by Respondent at the time concerning her alleged accident, and that this investigation was "the reason that any pay increase or any consideration of a pay increase for this young lady was delayed and held up by me. The investigation was started by me. I told her that in the meeting." The discussion then returned to the subject of her discharge, and Paladino stated that she was terminated for her activities subsequent to the June 30 meeting, "Where she directly violated instructions that I gave her orally and in writing not to attend that building. Okay and not to confront her supervisors on any questions but to bring those questions to me or Marie." McGrath then threatened to take action with the NLRB. At that point Paladino told Lisa that if she is caught in any of Respondent's buildings

he will have her arrested for trespassing, and that any communication with tenants during working hours in the private areas of these facilities that Respondent owns will be deemed a trespass on her part and will result in her arrest. McGrath disputed Paladino's right to restrict her presence in a public building and asserted that it was not the prerogative of Paladino to speak for his tenants. Paladino responded that he had a covenant with his tenants not to allow soliciting during business hours in their offices. McGrath replied that Lisa was allowed to talk to tenants at any time, and Paladino continued to disagree with that assertion. Lisa then asked if she could go to the DEC to get her belongings. Paladino responded no and that Mauro would arrange to have her belongings brought to her. The meeting then concluded.

Lisa subsequently received a copy of a termination report from Respondent, which asserts that she was terminated for, "insubordination with supervisors, failure to obey instruction of supervisor after both oral and written instructions were given." Lisa thereafter filed for unemployment insurance, which was originally denied. On appeal, however, the decision was reversed, with the appeals board finding that the requirement of Respondent that Lisa discuss problems only with Paladino and not with any other supervisors was unreasonable, and that the actions of Lisa in entering a building at the request of a tenant was not unusual. Thus it was concluded that Lisa "did not disobey reasonable requests of her employer and was thus not insubordinate. We disagree with the judge's conclusion that the claimant's actions were detrimental to the employer's interest."

The General Counsel introduced into the record various disciplinary reports and memos from Respondent's files that he contends establishes disparate treatment by Respondent of other employees who engaged in similar or more serious conduct than Lisa Walden and received more lenient treatment from Respondent. Employee Anthony Wilson was employed by Respondent at its Delaware Avenue location. Between August 18, 1994, and January 16, 1995, Wilson received a total of six written warnings from Respondent and was not discharged at that time, nor was he ever suspended by Respondent. The first two warnings dealt with carelessness on the job. The last four warnings, however, related to tardiness, unexcused absence, and failure to call when being absent. In several of these warnings, it was stated that further similar conduct would result in discharge. The warning on September 19, 1994, indicated that Wilson had left the job with permission, but had failed to return to work as promised and had failed to call. Wilson was finally terminated on February 2, 1995, when he again left work and failed to return or call.

Rich Meininger was employed at Swan Group by Respondent. He received four written warnings from Respondent between March 2, 1994, and September 16, 1994, for various problems including tardiness, substandard work, and leaving work without permission. On January 3, 1995, the file reflects a meeting with Meininger, Paladino, and Jurynec present. The memo indicates that Meininger had a problem involving leaving work in order to park his van, and apparently had a dispute with his supervisors about the matter during which he yelled and screamed at them. Paladino told Meininger that Respondent would accommodate him with respect to his parking problem, but he did not want Meininger to confront his supervisors anymore, and he "is

not to yell or scream at any other employee including his supervisors." Paladino also told Meininger that he was to follow the directions of his supervisors. Paladino also instructed Meininger that if he had a problem and cannot get satisfactory action from his supervisors he is welcome to see Paladino. Respondent's files also reveal a memo dated January 4, 1995, from Paladino to Jurynec and Shepard, with respect to Meininger. The memo reflects some details of the meeting on the prior day, and concludes by stating that Meininger should be accommodated with respect to his parking problem, because "apparently he is a decent worker when he is working."

Jennifer Stein, who was employed at Ellicott Square, was hired on March 21, 1994. On October 28, she received a written disciplinary report warning her for unexcused absence, tardiness, and leaving early. The report indicates that since her date of hire, Stein had 6 early quits, 6 absences (with a memo regarding absenteeism given on April 20), and 10 latenesses. She was warned that if this behavior continues it would result in termination. On January 13, 1995, Stein received another written warning for unexcused absence and tardiness. This warning referred to eight unexcused absences, two latenesses, and one early quit. Stein was warned that another violation of this nature will result in immediate dismissal. On January 18, 1995, Stein received yet another written warning, which refers to her January 13 warning, and states that subsequent to that warning, Stein was late on both January 16 and 17. Stein was informed in this memo that this was a final warning before dismissal. Respondent's file also reflects a memo dated January 17, 1995, from Jurynec to Paladino with respect to Stein, wherein based on Stein's record Jurynec asks whether Respondent can terminate her. Paladino responded in the memo to give her a final warning.

Joseph Call, a janitorial employee at 270 Michigan, received a written warning on March 14, 1994, for unexcused absence, indicating that he failed to call or report to work on February 25 and 28. It indicates that this conduct is a violation of company policy, and continued behavior will result in termination. Call received another similar warning also on March 14, concerning a similar failure to call or notify Respondent on March 2, 3, and 4. Once again Call was warned that continued behavior will result in termination. Call also received a third written warning detailing two additional incidents of failures to report to work or call on March 10 and 11. Once more Call was merely warned that continued behavior will result in termination. Finally Call was terminated on March 17, but only after he was observed by Lisa Walden, who at the time was filling in for Rose as supervisor, looking in a desk drawer of a tenant.

On January 4, 1994, Roger Miller, a maintenance employee, received a warning for an unauthorized break. He took an unauthorized break for 1-1/2 hours, and was docked pay for that period of time. On November 4, the file reflects a meeting between Jurynec and Miller during which she reviewed his attendance record, which revealed 20 days out of work between January and November, including 11 days nonpaid sick, 2 personal days, and 3 paid sick days. The memo indicates that Miller was told that Respondent was concerned about his attendance record and it really needed him to make every effort to come to work. The memo gives no further indication that any discipline was given to Miller

at that time, or even that he was warned of possible termination.

A janitorial employee at Ellicott Square, Carmen Collado received a written warning for failure to follow instructions on March 4. She failed to punch her timecard when leaving the facility, after being instructed by her supervisor to do so. She received another written warning on April 20, 1995, for being absent for 12 days between January 1 and April 19, along with a warning that this behavior will result in disciplinary action if repeated.

Additionally the following four employees received only a written disciplinary warning for failing to report to work or to call Respondent. Carmen Morales (June 16, 1994), Nancy Benson (May 2, 1994), and Santa Collado (March 27, 1995), Sophie Koniniec (July 26, 1994, this employee did not call or appear for work for 5 consecutive days, which was characterized by Respondent as an unauthorized leave of absence).

Paladino made all of the personnel decisions concerning Lisa Walden, and he furnished testimony as to his reasons for these actions. With respect to the denial of a pay raise for Lisa, Paladino testified on direct examination that he made the final decision, after having a discussion with Paul Moretta, another of Respondent's officials. Paladino could not recall, however, what discussion he had with Moretta concerning her pay raise. Paladino did testify that he made the decision, because Lisa had been out of work for 6 months on disability, during the period covered by her evaluation. Additionally he asserted that her evaluation was significantly worse than the evaluations of other employees at the building, and she was receiving the same amount of pay as her supervisor, Rose. Paladino also stated that he considered the fact that at the time he had ordered an investigation of Lisa's compensation claim, and he suspected that Lisa had filed a false claim. Paladino also testified that he read Lisa's evaluation, and concluded that the comments of Rose that were substantially favorable had little significance, since Rose was "a timid, nice lady." Paladino asserts, however, that he gave more credence to the comments of Shepard that indicated that her performance had been affected by her disability, and that she needs to improve. Paladino also claimed that he was not pleased that she did not appear to recognize that she had problems, since Lisa wrote on the evaluation, that she felt it should have been a little better.

On cross-examination however, Paladino was confronted with records from Respondent's files, which indicated that Lisa Walden had been scheduled to receive an increase of 15 cents per hour, but that the increase was crossed out and a zero was placed next to her name. At that time Paladino's memory concerning his alleged conversation with Moretta suddenly improved. Paladino recalled that he had initially made a recommendation to grant Lisa the 15-cent-per-hour increase, after reading her evaluation. He claims, however, that after it was given to Moretta for comment, Moretta informed Paladino that Rose was a supervisor and that Paladino's recommendation resulted in an identical salary for Rose and Lisa. Moretta also according to Paladino, alerted him to the fact that Lisa had not worked for 6 months during the evaluation period, and that she was not performing up to par. Although all of these matters were included in the evaluation that Paladino read, Paladino claims that he had not noticed any of those factors until Moretta brought them to

his attention. With respect to the issue of Rose being a supervisor, Paladino admitted that there had been a dispute between himself and the Union in December 1993 concerning whether Rose was a supervisor, and that letters were exchanged between Respondent and the Union on that subject. Paladino insisted, however, that he did not recall that Rose was a supervisor when he first decided to grant Lisa an increase. Additionally, Paladino insisted that although he had suspicions about the validity of Lisa's compensation claim, that was not a factor in his decision not to grant her a pay increase.

Paladino could not recall precisely when he first made a tentative decision to give her a raise, nor when he changed his mind subsequent to his discussion with Moretta. He did testify that these events occurred sometime between June 12 and 30. An examination of Respondent's records reveals that at 270 Michigan, Respondent employed four employees including Rose. Two of the employees there received increases of 25 cents per hour to \$5.75 per hour. Rose had her salary raised from \$6.20 to \$6.50 per hour. Lisa Walden was originally slated for a raise from \$6.20 to \$6.35, and as noted she received no increase. Respondent also employed 12 employees at its Swan Group facility. Of these employees 10 received raises in June, ranging from 13 cents per hour to \$1.50, plus raises for 2 salaried employees of \$20 to \$29 dollars per week. One employee at that facility, Tim Williams did not receive a raise, although Paladino had originally scheduled him for a raise of 50 cents per hour. According to Paladino the scheduled raise for Williams was rescinded when Moretta informed Paladino that Williams would not be a long-term employee. Raises were also given to employees Nancy Benson, Roger Miller, and Richard Meininger, who as noted above had written warnings in their files for infractions committed during the appraisal period. Lisa Walden was hired by Respondent on November 24, 1989. She received a wage increase on each occasion when Respondent subsequently granted raises to its employees, except for June 1992 when she did not receive a raise because she had been written up during the appraisal period for making an unauthorized phone call. According to Paladino, this incident involved Lisa being caught "stealing over \$800 worth of phone calls." The record also reflects that on April 29, 1992, Respondent received a letter from John Spagnoli, regional director of the DEC, complimenting Lisa Walden for her honesty in returning a lost wallet to him, and thanking Respondent for "hiring high quality personnel." Lisa did not receive a written warning or any other disciplinary action during the appraisal period covering the June 1994 increase. The record also reflects that those employees who received increases in June were notified by a memo from Paladino dated June 29 indicating that the wage increase will be effective as of June 19.

Respondent introduced into the record documents from its files which it contends demonstrates that it treated other employees similarly to Lisa Walden. Dolores Ulanowitz was an employee of Respondent at 478 Main Street, who was on disability from May 11 through June 30, 1992. Respondent's records reveal that she did not receive a raise in June 1992, and that in its records the word disability is inserted next to her name in place of a wage increase. Additionally the files reveal that her evaluation was dated May 21, 1992, and was not signed by the employee, and in the space for the signa-

ture the words "on disability" appear. The records also reflect that Ulanowitz received a wage increase on June 27, 1993. Heather Nemec was employed as a salaried employee in the architectural drafting department. Respondent's records reveal that she was on maternity leave from March 18 to June 20, 1994. She did not receive a wage increase in June 1994, and a memo in the file indicates that she was told that the reason for such failure was that Respondent was uncertain of her job status, and did not know when or if she would return due to her maternity leave. She was told that she would be evaluated for an increase in 3 months. The records also reflect that she received an increase on October 9, 1994.

With respect to Lisa's 1-day suspension, Paladino testified that he decided to suspend her because he did not believe that she was sick on that day. He added that in his view, calling in sick means you are using a sick day as opposed to a personal day. According to Paladino, if Lisa had called and requested a personal day, it would have been fine. In that connection, Respondent's employees were entitled to 3 sick days and 2 personal days per year. Respondent did not check to see whether Lisa had used her sick days or personal days when Paladino ordered her suspension. It also appears that Lisa did not receive payment for the sick day in question.

With regard to the extension of Lisa's suspension, Paladino testified that subsequent to his having suspended her for 1 day, he was informed by Shepard about his conversation with Lisa on June 30. Paladino instructed Shepard to prepare a memo of that discussion, which he did on that same date. Additionally Paladino was informed by Shepard about the conversation between Rose and Lisa on July 1, which was memorialized in a memo from Shepard to Mauro that was turned over to Paladino. Paladino did not discuss the matter with Rose, nor did he ask Lisa for her version of either of the conversations. Paladino asserts that based on these two memos he concluded that Lisa had flagrantly defied his previous instructions not to discuss certain matters with anyone other than himself or Mauro. Therefore Paladino states that he decided to suspend Lisa until July 20. He chose July 20 as the date for her suspension to end, because he was going to be in Italy until that date, and he "did not want her on the job while I was gone." Furthermore, Paladino testified that he had not made up his mind at that time whether or not to discharge Lisa, but he wanted her to cool down.

Respondent introduced evidence from its files coupled with some testimony from its witnesses concerning its treatment of other employees for engaging in what Respondent contends was similar conduct to that of Lisa Walden. Greg Nati was suspended for 3 days on October 1, 1991. According to the file memo, he was found in one of Respondent's buildings with his brother-in-law taking pictures of a baseball stadium outside of his working hours. Also, he did not sign in when he entered the building. The memo also states that Nati was a former prisoner on parole, and had been suspected of theft in a prior incident involving the Postal Service. According to Paladino, he told Nati that he must not have any visitors in the building especially during off hours, and there will be no drinking, drugs, or visitors on the job. Respondent's files also reflect a warning issued to Michael Walden on September 10, 1993, for using the phone in an office of a tenant, when he should have been sweeping hall-

ways. Additionally the file contains a memo from Mauro to Paladino reporting the incident, which included the facts that Walden would not concede that he had done anything wrong. The memo includes a statement written by Paladino to the file that Walden had been warned and "next time-fire him." Finally Respondent introduced a memo from Mauro to Paladino dated August 19, 1993, with respect to employee Paul Hennigan. The memo reflects that Hennigan had argued with a tenant, and the tenant in turn complained to Mauro that Hennigan had not acted properly in failing to do anything about someone who had fallen in the building. Mauro apologized to the tenant, and then proceeded to inform Hennigan that at no time should he confront a tenant or loudly argue with someone. At that point Hennigan began to scream at Mauro and criticized her for not backing him up. Hennigan continued to raise his voice to Mauro in the lobby, so she told him to punch out and leave for the day. Mauro also testified with respect to the incident that she had asked Hennigan to lower his voice because there were tenants going by, and he began to yell even louder, at which time she ordered him to punch out and go home for the day.

With respect to Walden's discharge, Paladino testified that when he returned from vacation prior to July 20, he reviewed Lisa's file and made a tentative decision to discharge her if she confirmed certain things during the meeting. These items included that she spoke to Shepard after being warned not to, that she received all of the warning letters, and that she entered Respondent's building after receipt of a warning that she should not do so. Paladino added that he had not formed any conclusions after the second suspension, which was to "cool her down," and that "I don't like firing people. It's not my nature." Paladino further testified that she was discharged because of "insubordination and it was a failure to follow direct instructions." Paladino also asserted that he believed that Lisa Walden was "the most arrogant and demanding and defiant employee," he had ever dealt with in over 20 years.

The record reflects that the DEC assigned individual security codes to Respondent's employees which is distributed to employees in a sealed envelope. Respondent required the employees to furnish their code to it, and Respondent kept a record of the codes. Although Walden was on suspension, she requested that a representative of the DEC change her code, without notifying Respondent of her action. She did so, because she felt that Shepard might use this knowledge of her code to get her in trouble in view of her recent disagreements with him, particularly over family matters. The DEC representative complied with Lisa's request, and sent a letter to Respondent dated September 8, which reported that it had changed her code on July 19, and that since the DEC had recently been informed that Walden was no longer assigned to the building, her code was deactivated. Paladino testified that he considered Walden's actions in circumventing company procedures in changing her code to be a serious breach of security, and that had he known about this conduct at the time, "she would have been gone then." Paladino testified on both direct and cross-examination that he assumed that Lisa may have thought that her suspension would result in a change of the code, and she wished to avoid that result and continue to have access to the building. On cross-examination, however, he was not as unequivocal about what this actions would have been had he been aware of this conduct

prior to her termination. He testified on cross-examination, that had he known about this conduct “back then, okay, I certainly would have taken some other action, or quicker action than I had taken.”

II. ANALYSIS

A. Alleged Interrogations

I have found above that on June 30, Paladino interrogated Michael Walden concerning whether he received pay from the Union for being shop steward, and whether he knew anything about the unfair labor practice charges filed by the Union, or whether he had spoken to McGrath about such charges. I conclude that this questioning of Walden by Paladino was coercive. *Domsey Trading Corp.*, 310 NLRB 777, 790 (1993); *Bradford Coca Cola*, 307 NLRB 647 (1992). I also note that the interrogation was conducted by the chief operating officer of the company. *America's Best Quality Coating*, 313 NLRB 470 (1993); *Teskid Aluminum Foundary*, 311 NLRB 711, 716 (1993); *Advanced Waste Systems*, 306 NLRB 1020 (1992), in his office, *Marriott Co.*, 310 NLRB 1152, 1157 (1993); *Pacesetter Corp.*, 307 NLRB 514, 517–518 (1992), and accompanied by hostile and threatening remarks such as whether Respondent can expect 100 percent from Walden, whether he can stand on his own two feet, and the inquiry “who the fuck is your mother in-law?” *SSC Corp.*, 317 NLRB 542 fn.1 (1995); *Garney Morris Inc.*, 313 NLRB 101, 115 (1993); *Kroger Co.*, 311 NLRB 1187, 1199 (1993); *Advanced Waste*, supra.

Similarly, I also conclude that Paladino's interrogation of Lisa Walden on the same day concerning why and how she was selected to be shop steward was coercive. This questioning also occurred in Paladino's office and was conducted by Paladino, Respondent's president. Additionally Respondent demonstrated hostility toward Lisa by various comments made by Paladino. Thus the initial inquiry, “where do you get off saying you can be union steward for 290,” demonstrates his annoyance with her activities in that regard. Moreover, during the meeting Paladino criticized Lisa for involving her mother in protesting Respondent's failure to pay jury duty compensation for Michael Walden, and instructed Lisa to tell her mother to “mind her own business.” Finally Paladino also threatened to transfer Lisa to another facility during the course of the meeting. Although Respondent asserts that Paladino's sole motivation in suggesting the transfer was to enable Lisa to receive more money at a union represented facility, I find this contention unconvincing. Because Respondent had just denied her a wage increase, it seems unlikely that Paladino would be concerned about raising her salary. More significantly, when Paladino made the suggestion, Lisa adamantly objected and in fact began to cry when Paladino insisted on his right to transfer her if he so desired. Thus if Paladino was truly concerned with Lisa's salary, he would have withdrawn the offer since she was clearly opposed to the transfer.

Accordingly, based on the authorities and analysis detailed above, I conclude that Respondent has violated Section 8(a)(1) of the Act by interrogating Lisa and Michael Walden on June 30.

B. The Alleged Insistence on Withdrawal of Unfair Labor Practice Charges as a Condition of Reaching or Executing a Collective-Bargaining Agreement

It is undisputed that Respondent in mid-June, withdrew its tentative agreement on contract terms with the Union, because the Union had sought to refile a previously withdrawn unfair labor practice charge (ULP). Moreover Respondent continued to refuse to execute an agreed-on contract until the Union furnished Respondent with a withdrawal “with prejudice” of the ULP charges. By conditioning agreement on the terms of a collective-bargaining agreement, on the Union's withdrawing unfair labor practice charges, and by withdrawing previously agreed-on terms, because the Union sought to file unfair labor practice charges, Respondent has violated Section 8(a)(1) and (5) of the Act. *Caribe Staple Co.*, 313 NLRB 877, 890 (1994); *John Wanamaker Philadelphia*, 279 NLRB 1034, 1047 (1986); *Loredo Packing Co.*, 254 NLRB 1, 18 (1981).

C. The Refusal to Grant a Wage Increase to Lisa Walden

In June, Respondent conducted its annual review of employees at its unrepresented facilities for wage increases. Respondent announced wage increases on June 29, effective June 19 for all employees at 270 Michigan except for Lisa Walden, and for 10 of the 12 employees employed at 290 Main. It is significant to note that during the period of mid-June, apparently when Respondent's decision was made, it was in the midst of several disputes with the Union, during which Paladino demonstrated animus and annoyance toward the Union. Thus, on June 15, the Union attempted to refile its previous unfair labor practice charge which as I have found above resulted in Respondent's violating the Act by withdrawing its previous proposals and agreements with the Union. Paladino was clearly and admittedly most disturbed at the Union's actions, which he deemed to be unethical and renegeing on a prior agreement to withdraw the charges. Also, McGrath on behalf of Michael Walden had complained to Respondent about jury pay, which complaint Paladino rejected in a letter of June 20. Although McGrath wrote back to Respondent agreeing with Respondent that Walden was not entitled to the pay, Paladino found it necessary to write back on June 24 stating that he felt that Walden was pressuring Respondent to give him special treatment as shop steward. When the Union sought to appoint Lisa Walden as shop steward for two locations, Paladino refused to accept the Union's designation. In Paladino's letter of June 9 with respect to 290 Main Street, and with respect to 270 Michigan, Paladino asserted that he will recognize Walden if she is the duly elected representative of employees at that property. While McGrath wrote back on June 14, accepting Respondent's position with respect to 290 Main, he criticized Paladino for insisting on Lisa being a duly elected representative with respect to the facility where Lisa worked, asserting that this was “not your prerogative.” McGrath added that the appointment of shop stewards was none of Respondent's business. These comments of McGrath illustrate a problem with Paladino's propensity to improperly interfere with the internal affairs of the Union, which also demonstrates animus toward union activities. I note in this connection that Paladino had previously insisted that a union business rep-

representative, Bill Covington, not be assigned by the Union to service Respondent's buildings. This action by Paladino, as well as his refusal to accept Lisa Walden as shop steward for both facilities were clearly unlawful, but since no charges were filed with respect to these matters, I shall not make such a finding. However, I can and do consider these actions as illustrative of Respondent's attitude and animus toward the Union.

Moreover, Respondent demonstrated substantial animus towards the Union and its choice of Lisa Walden as shop steward during the meetings of June 30. During the meeting with Michael Walden, Paladino unlawfully interrogated him about his possible shop steward pay, as well as his knowledge of the Union's filing charges. Thus it is clear that he was still upset at the Union for filing these charges, and his question of Michael concerning shop steward pay seems likely to have had some relationship to the fact that Respondent had just denied his wife (who had just been designated a steward) a pay increase. Additionally this questioning once again demonstrates Paladino's propensity to delve improperly into the Union's internal affairs, as he has no business in determining whether or not McGrath had consulted with shop stewards or employees before filing charges. Paladino's subsequent unlawful interrogation of Lisa concerning how and why she was selected as shop steward further demonstrates this propensity of his, as well as the fact that he did not consider the issue of Lisa's shop steward position closed, and that he was not happy about her selection.

The above-detailed examples of Respondent's antagonism toward the Union and its selection of Lisa Walden as shop steward, and the close proximity of these events to the denial of her wage increase establishes a prima facie case that Respondent's denial was motivated by these factors. The burden then shifts to Respondent to prove by a preponderance of the evidence that it would have taken the same action with respect to her wage increase, absent such protected activities. *Wright Line*, 251 NLRB 1083 (1980). In my view, Respondent has fallen far short of meeting its burden in that regard. It is undisputed that Paladino initially had penciled in a wage increase for Lisa on Respondent's form, but at some point between June 12 and 30 this decision was changed to no raise at all. Respondent has failed to offer a credible or convincing explanation as to why Paladino changed his mind in the midst of all of the above-described problems with the Union.

In that regard, Paladino testified initially that he decided not to give Lisa Walden a wage increase, because she had been out of work for 6 months on disability during the period covered by the evaluation, her evaluation was significantly worse than the evaluations of other employees at the building, she was receiving the same salary as her supervisor, and that he had suspected at the time that Lisa had filed a false compensation claim. Paladino also testified that after reading Lisa's evaluation he concluded that the comments of Rose (her supervisor) that were favorable to Lisa had little significance since Rose was a "timid, nice lady," and that he would give more credence to the comments of Shepard that Lisa's performance had been affected by her disability, and she needed to improve. On cross-examination, however, after being confronted with Respondent's records that indicated that Lisa had been slated for a raise, a fact that Paladino conveniently ignored in his initial testimony,

Paladino's testimony suddenly changed. Thus he then was able to allegedly recall clearly a discussion with Moretta, that he had no recollection of on direct testimony, during which Moretta allegedly brought to his attention that Rose was a supervisor, that Paladino's recommendation would result in an identical salary for Lisa and Rose, that Lisa had not worked for 6 months during the evaluation period, and was not performing up to par. Moreover, when asked by me concerning his suspicions about Lisa's false compensation claim, Paladino insisted that this was not a factor in his decision not to grant her a raise. This latter assertion by Paladino is quite revealing, since at the June 30 meeting he informed Lisa that this was one of the reasons for the denial of her increase, and at the July 20 meeting when explaining the decision to McGrath, Paladino stated that the investigation concerning her compensation claim was "the reason that a pay increase or a consideration of a pay increase for this young lady was delayed and held up by me." Paladino did not mention any of the other reasons that he described in his testimony here when discussing the issue with McGrath. I find that Paladino's vacillating, contradictory, and inconsistent testimony in this regard, substantially hampers Respondent's attempt to meet its *Wright Line* burden of establishing that it would have taken the same action against Walden absent her protected conduct, and detracts from his credibility with respect to all of the personnel actions that Respondent took against Walden. His testimony that Moretta brought to his attention various matters that he had allegedly not noticed when he read Lisa's evaluation, I find to be contrived and not persuasive. Thus his testimony that he did not realize that Rose was a supervisor cannot be believed, inasmuch as Paladino had testified that he gave little credence to the evaluation of Rose because she was a "nice, timid lady." Moreover Respondent and the Union had exchanged letters concerning a dispute over the question of whether Rose was a supervisor, thus making it quite unlikely that Paladino would forget this fact. Additionally, Paladino admitted that he read the evaluation of Walden, and particularly relied on the comments of Shepard. These comments emphasized the fact that Lisa had been out on disability, and this in the view of Shepard had adversely affected her work. Therefore Paladino's testimony that he had not noticed this fact also cannot be credited. Finally, although Paladino initially testified that one of the reasons for his decision was the fact that Lisa's evaluation was significantly worse than those of other employees at the building, he did not mention this factor on cross-examination, or in either the June 30 meeting or the July 20 meeting when he discussed his alleged reasons for denying Lisa a raise.⁴ I therefore conclude that Paladino's inconsistent testimony demonstrates that an inference is warranted that since Respondent has vacillated in offering a consistent explanation for its actions, that the real reason for its actions is not among those asserted. *Robin Transportation LTD*, 310 NLRB 411, 417 (1993); *Kenrich Petrochemicals*, 294 NLRB 519, 533 (1989); *P.I.E. National*, 282 NLRB 1060, 1064-1065 (1987). The drawing of such an inference

⁴In this connection, it is noted that Respondent failed to introduce into the record, any evaluations of other employees that could have substantiated its position in this regard. It is also notable that Moretta was not called as a witness to corroborate Paladino's testimony in connection with the pay raise.

is appropriate here, and substantially detracts from the validity of Respondent's defense and its attempt to meet its *Wright Line* burden of proof. *Robin Transportation*, supra.

Respondent argues that the evidence submitted of its past treatment of employees Ulanowitz and Nemec demonstrate that it denied pay raises in the past to employees because they had been out on disability, similar to the situation with Lisa Walden. I do not agree. In both of the instances cited by Respondent, the employees involved (one of whom was a salaried employee unlike Walden) were both still out of work, and on disability when the evaluations were issued and when the decision was made not to grant them raises. Indeed, in the memo describing Respondent's decision with respect to Nemec, it was specifically mentioned that Respondent did not know when or if she would return to work from her maternity leave. However, here Lisa Walden had been back to work from her maternity leave for several months prior to her evaluation and Respondent had no doubt that she was at work. Therefore, I conclude that the prior instances cited by Respondent have little or no relevance to an assessment of Respondent's actions with respect to Lisa. It is also significant that Lisa Walden had received raises on each prior occasion that Respondent granted increases, except for one instance when she had been issued a written warning during that appraisal period. Moreover during the appraisal period covering the June 1994 wage increase, Lisa did not receive any warnings or other disciplinary actions. It is notable that Respondent did authorize and grant raises to three employees, Miller, Benson, and Meininger, all of whom had received a written warning during the appraisal period prior to the June increase.

Accordingly based on the foregoing, I find that Respondent has not met its burden of establishing that it would have to denied Lisa Walden a raise absent her protected conduct. Therefore Respondent has violated Section 8(a)(1) and (3) of the Act.

D. *The 1-Day Suspension of Lisa Walden*

Based on the above analysis concerning the denial of Lisa's payraise, which includes my finding that such action violated the Act, it is appropriate to conclude, which I do, that a motivating factor in Respondent's action in suspending Walden on June 30, still in the midst of Respondent's disputes with the Union, was Walden's protected conduct of being selected as shop steward. This conclusion is further reinforced by the events at the June 30 meetings with the Waldens, particularly with respect to Paladino's reaction to the efforts of Shirley Jones, Lisa's mother to involve herself in the jury pay issue of Michael Walden. It is clear that Paladino was most upset at this development, and in fact called a meeting with both Waldens primarily to discuss that matter. During the meeting with Michael, Paladino criticized his mother-in-law for getting involved in his jury duty pay, and castigated Michael for not standing on his own two feet, and allowing his wife (Lisa) and his mother-in-law to run his life. Paladino also criticized the involvement of Jones in his meeting with Lisa, and twice told her that her mother should mind her own business. In my view, this reaction of Paladino was directly related to the shop steward issued, as well as his dispute with the Union concerning the refiling of the charges. Paladino's actions in interrogating Michael Walden about his shop steward pay and his knowledge of the refiling

of the charges, coupled with the statements about his mother-in-law, followed by a remark questioning whether Michael was going to give Respondent 100 percent, strongly suggests the interrelationship of these events. Thus, I believe that Paladino viewed the bringing up of the jury pay issue, which he thought was settled as similar to the Union's action in refiling the unfair labor practice charge that Paladino thought had been resolved. Moreover it is also clear that Paladino viewed Lisa Walden as the moving force behind her mother's efforts to become involved in the jury pay issue. Therefore Paladino became convinced that Lisa Walden was not someone who he wanted as a shop steward, because she was engaging in the same conduct as the Union to which Paladino had found highly objectionable; i.e., the alleged renegeing of agreement and the bringing up of matters previously settled. It appears that Paladino's objections to Lisa becoming shop steward was further demonstrated by her actions at the meeting, and prior thereto. Lisa had requested to see her personnel file in connection with her complaint about the failure to grant her a raise. Paladino denied that request, and also testified that he considered her to be the most arrogant, demanding, and defiant employee that he had ever dealt with in over 20 years. Particularly since Paladino had bragged about his good relations with the Union, and the failure of prior shop stewards and the Union to file grievances with Respondent, it is obvious that Paladino did not view Lisa Walden as someone who would continue that practice. She was someone who was not afraid to speak up for herself, or on behalf of others, and would be likely to challenge Paladino as shop steward in his dealings with employees.

Moreover, apart from her selection as shop steward, Lisa Walden's perceived connection with her mother's call to Paladino was independently protected concerted activity. Thus, Lisa was acting on behalf of fellow employee Michael with respect to a grievance and a term and condition of employment. *Boise Hilburn Electric Service Co.*, 313 NLRB 372, 373-374 (1993), and cases cited there. Paladino's antagonism toward Lisa for this conduct was demonstrated most forcefully by Paladino's own statement at the July 20 discharge meeting. Thus, when McGrath asked Paladino when the problems with Lisa started, Paladino replied, "when she decided to become involved in the issue that involved her husband concerning being paid for jury duty time." Indeed when McGrath protested that Lisa had not been deeply involved in that issue, Paladino responded, "She made herself involved in it." Therefore based on the above, a strong prima facie case has been established that protected conduct of Lisa Walden was a motivating factor in her suspension.

Once again I conclude that Respondent has fallen far short of meeting its burden of establishing that it would have suspended Lisa absent her protected conduct. Respondent has failed to show that it has ever suspended any employee in the past for engaging in conduct similar to that of Lisa Walden. *Phillips Industries*, 295 NLRB 717, 718 (1989); *Hicks Oils & Gas Inc.*, 293 NLRB 84, 85 (1989). On the contrary, the record discloses that Respondent treated other employees who engaged in similar or much worse conduct than Lisa Walden in a much more lenient manner. Thus employees such as Wilson, Meininger, Stein, and Call received from three to six warnings each for various transgressions including unexcused absences, failure to call when out sick, and

leaving work without permission. In none of these cases did the employees receive any disciplinary action other than a written warning from Respondent for such conduct. Additionally employees Morales, Benson, Koninieć, and Santa Collado who failed to report to work or call received only written warnings. One of these employees engaged in that conduct for 5 consecutive days, which Respondent characterized as an unauthorized leave of absence.

Respondent argues, however, that these past instances of allegedly disparate treatment should be disregarded, since Lisa Walden's conduct of calling in sick when Respondent knew that she was not is a totally different and unique situation. Respondent also argues that her conduct should be treated as an employee who becomes sick on the job, where her proper recourse would be to ask permission from a supervisor to leave early. I do not agree. In my judgment, the other employees who Respondent issued only warnings to engaged in clearly more egregious conduct than Walden. The failure to call when not coming to work clearly has a more significant effect on Respondent's operation than an employee who does call as did Walden, but merely selected sick leave rather than personal leave in order to justify her absence. Thus, Paladino admitted that if Walden had taken personal leave it would have been no problem. Moreover Respondent admittedly did not even check to see whether Walden had any personal or sick days available to her. Respondent's contention that Walden's conduct should be considered leaving work without permission is without merit. Respondent adduced no testimony that any of its witnesses considered her actions in that light. More importantly, the written disciplinary report that Respondent gave to Walden indicated that she was suspended for "unexcused absence." This is the identical phrase that Respondent used in issuing a number of the written warnings to its other employees that as noted resulted only in additional warnings and not suspensions. It is also noted that even considering her conduct as leaving without permission, Respondent's past practices demonstrate more lenient treatment for this action. Respondent's records reveal a warning issued to Anthony Wilson for "leaving without permission." The memo indicates that he left the job, and did not return to work or call as he had been instructed. Despite the fact that Wilson had received another warning only a month before, his penalty for this infraction was merely another written warning. Also employee Roger Miller received a written warning for taking an unauthorized break for an hour and a half. He was docked 1-1/2-hour's pay, but was not suspended. Here, as noted, Walden was suspended for 1 day, as well as not being paid for the sick day.

Accordingly, I conclude that the above evidence of disparate treatment, substantially detracts from Respondent's attempt to meet its *Wright Line* burden. *Pope Concrete Products*, 305 NLRB 989, 990 (1991). I find that it has not shown that it would have suspended Walden absent her protected conduct, and that Respondent has therefore violated Section 8(a)(1) and (3) of the Act by its 1-day suspension of Lisa Walden on July 1.

E. The Extension of the Suspension to July 20

Respondent, by letter of July 5, extended Walden's suspension until July 20, thereby suspending her for an additional 11 days. Because I have concluded above that the initial 1-day suspension was unlawful, a *prima facie* case has

been established concerning any extension of that suspension, that is based in part on the first suspension. *Joe's Plastics*, 287 NLRB 210, 211-212 (1987); *Mid-Mountain Foods*, 291 NLRB 693, 699 (1988). Thus, since Respondent's letter of July 5, announcing the suspension extension, makes specific reference to the earlier 1-day suspension, it is appropriate to find and I do that a motivating factor in Respondent's decision to extend the suspension was Lisa Walden's protected conduct.

Moreover, even absent consideration of the prior unlawful suspension, a strong *prima facie* case of discriminatory conduct by Respondent with respect to the 11-day suspension has been established. In that regard, the timing of this suspension in the midst of Respondent's disputes with the Union, and Paladino's antagonism toward the Union and toward Lisa Walden for her selection as shop steward and her engaging in independently concerted activity of protesting her husband's denial of jury pay, is more than sufficient to prove that a motivating factor in Respondent's decision to extend her suspension was protected conduct.

In either case, the burden shifts to Respondent to establish by a preponderance of the evidence that it would have taken the same action against Lisa Walden absent such protected activities. In attempting to meet that burden, Respondent must demonstrate that it did not rely on the prior unlawful suspension, or the events related thereto, and that it made its decision based solely on events unrelated to the July 1 suspension. Respondent clearly has not so established, since its own letter announcing the extension made specific reference to the earlier suspension, and no testimony was offered to establish that Respondent did not consider the prior suspension when it was extended by 11 days. Once again, even without reference to the unlawful initial suspension, I am not persuaded that Respondent has adduced sufficient evidence to establish that it would have suspended Lisa Walden for 11 days absent her protected conduct. As was the case with the initial suspension, Respondent has not shown that it ever suspended an employee for engaging in conduct similar to that of Walden. *Phillips*, supra.; *Hicks*, supra.; See also *Aratex Services*, 300 NLRB 115, 116 (1990), in which the Board found that an employer had not met its *Wright Line* burden when an employee had violated a company rule that provides for discharge for the offense committed by the employee, in part because the employer did not show that it treated a similarly situated employee in the same fashion as the discriminatee therein.

In fact, as was also the case with the initial suspension, the record contains evidence of disparate treatment of employees who engaged in conduct similar to Walden, and received more lenient treatment from Respondent. Paladino testified that he extended Walden's suspension because she had violated his specific instructions not to discuss any matters that had been brought up at the June 30 meeting with any other supervisors. Employee Carmen Collado received only a written warning for her failure to follow instructions given her by her supervisor to punch her timecard before leaving the premises. She was not suspended at all, much less for 11 days. Employee Richard Meininger, who had previously been issued four written warnings for various infractions, had a dispute with his supervisor over parking his car, during which he refused to follow the supervisor's directions and yelled and screamed at the supervisor. Meininger did not re-

ceive even a written warning for this conduct, much less an 11-day suspension. He was told during a meeting with Paladino, that he must not yell or scream at supervisors, and must follow directions of supervisors, but not only was he not further disciplined, but the supervisor was instructed by Paladino to accommodate Meininger with respect to his parking problem. Meininger was also told that he could speak to Paladino if he could not get satisfactory action from his supervisor. Contrast that with the treatment of Lisa Walden who was forbidden from discussing matters with her supervisors.

Moreover, I also note that the order that Paladino gave to Walden was issued to her at a time when she was upset and crying, where it was not totally clear that she understood Paladino's instructions. Such an order, which was deemed to be "unreasonable" by the New York State Unemployment Commission, is not the type of order that employees would readily understand, since they normally discuss all matters relating to their conditions of employment with their supervisors. Although whether or not the order is "unreasonable," is not determinative of whether an employer may lawfully discipline an employee for violation of such an order, it is relevant to an assessment of whether employers in general or this employer in particular, would be likely to suspend an employee for 11 days for violating this order. I conclude based on all of the foregoing that Respondent has not shown that it would have taken such extreme action against Walden absent her protected conduct. Therefore Respondent has violated Section 8(a)(1) and (3) of the Act by extending Walden's suspension to July 20. I so find.

F. The Discharge of Lisa Walden

In assessing the legality of Respondent's termination of Walden, once again my findings above that the prior suspensions of Walden were unlawful is sufficient to establish a prima facie case that the subsequent discharge was also unlawful, where Respondent as here has relied in part on the suspensions to justify its ultimate termination decision. *Joe's Plastics* supra. Once again I conclude that even absent such prior findings, that the evidence is sufficient to warrant the conclusion that a motivating factor in the discharge was Lisa Walden's protected conduct. As noted above, when Paladino was explaining her discharge to McGrath, he stated that all the problems with Lisa started when she became involved in her husband's jury duty pay. I have concluded that this conduct was protected concerted activity in itself, as well as being related to the question of her being selected as shop steward. In my view, Paladino viewed Lisa's conduct as similar to the Union's renegeing on a prior agreement, and became convinced that she was not a person that he wished to deal with as a shop steward. Indeed Paladino had a relatively peaceful relationship with prior shop stewards and it is clear that he viewed Lisa Walden as someone who was not afraid to speak up for herself or others. Paladino's characterization of Walden as demanding, defiant, and arrogant can reasonably be construed as relating to her actions in not blindly accepting any unreasonable order of Respondent without raising a question. The above comments of Paladino, coupled with his unlawful interrogations of both Michael and Lisa, as well as the timing of the termination, are more than sufficient to establish that Lisa's protected conduct was a motivating factor in her discharge.

In order to meet its *Wright Line* burden here, Respondent must establish that it would have terminated Walden for actions that occurred subsequent to the second suspension. Clearly Respondent has not done so, since it is clear that Respondent considered all of her prior conduct in discharging her. In that connection Paladino made specific references to the prior suspensions when he explained his discharge decision to McGrath and Walden on July 20.

Furthermore a consideration of the events relied on by Respondent that occurred subsequent to the second suspension, do not support the conclusion that Respondent would have terminated Walden for such conduct absent her protected activity. Paladino testified that she was discharged for insubordination and the failure to follow direct instructions. He furnished more specific details during the July 20 meeting, which were further elaborated on by Respondent in its brief. Respondent argues that Walden's conduct in entering Respondent's building and disrupting tenants by conducting personal business with employees there were violations of company rules and justified discipline. In that regard Respondent relies on the treatment of Nati, who was suspended for 3 days, and the prior incident involving Michael Walden when he was issued a warning for entering tenant offices without permission. I do not find Respondent's argument persuasive. I do not believe that Paladino was concerned about tenant security or the fact that tenants may have been bothered by Walden's conduct. In my view what Paladino objected to was her efforts to obtain letters from tenants praising her work. Rather than considering these letters on their merits, and being grateful to the tenants for complementing his employees, Paladino became enraged by his receipt of these letters. This is rather unusual behavior, as most employers would be likely to be pleased by the receipt of such letters, and would probably lead such employers to reconsider their evaluation of the employees' performance in light of such letters. I believe that Paladino did not so react, because he viewed Walden's actions as but another example of her aggressive behavior and her propensity to speak up for herself or others, traits which he was not desirous of being confronted with by a shop steward. It is noteworthy in this regard that Respondent received no complaint from any tenants about Lisa's conduct. Indeed when according to Shepard's memo of July 11, Rose attempted to apologize to an employee of the DEC for Lisa's conduct, the employee responded that the facility was a state building, and Lisa was not on Respondent's time. Moreover it is clear that Rose herself was engaged in the same conduct of purchasing Avon products from DEC employees, and apparently was not even spoken to about that alleged violation of company rules.

Respondent's reliance on the prior incidents of discipline I find to be misplaced. The conduct of Nati was clearly more serious a transgression than Walden's, since he was caught entering an unoccupied building without signing in and he was also suspected of a prior theft. Further he was only suspended for 3 days and not discharged as was Walden who engaged in less serious conduct. Similarly Michael Walden, was merely issued a warning for using the phone in a tenant's office, when he should have been working. Notably, Lisa, Walden was not on worktime when she entered a tenants office and she was terminated.

The second postsuspension incident relied on by Respondent was Walden's conversation with Mauro during which

Lisa allegedly became insubordinate. In this regard Respondent points to the fact that Walden questioned whether Mauro had the right to order her not to telephone Rose, and told Mauro that she could do what ever she wants to on her own time. However it is significant to note that in fact Lisa did not call Rose as she threatened to do and therefore did not violate the order of Mauro not to do so, and Respondent was aware of that fact before Paladino informed Lisa that she was terminated. In this connection, Respondent relies on its prior treatment of employee Hennigan to establish prior consistent disciplinary action by it. I cannot agree. That incident involved without question more flagrant conduct by Hennigan. Thus, he not only argued with and yelled at a tenant, but he also raised his voice to Mauro, and refused to comply with her order to lower his voice. Yet though he engaged in this clearly egregious behavior, Hennigan was merely suspended for 1 day and was not discharged.

Finally, Respondent relies on Walden's conduct in entering Respondent's premises on July 11 in violation of explicit instructions not to do so. There is no question that Lisa did violate these instructions of Respondent, but in my view this was a rather innocuous incident that lasted a short time. It is also significant that the tenant involved had no problem with Lisa being there and conducting her Avon business. Therefore it is not likely that this conduct would warrant the severe penalty of discharge. It is once again significant to note that Respondent has not established that it has ever terminated an employee for engaging in such conduct. To the contrary, as described above employees who also violated instructions of supervisors received much more lenient penalties, such as warnings or a 1-day suspension. In this regard, Paladino testified that, "I don't like firing people. It's not my nature." I find this testimony by Paladino to be credible, inasmuch as it is supported by an examination of Respondent's records. I also conclude, however, that Paladino did not display his normal reluctance to discharge employees in his treatment of Lisa Walden. The only plausible explanation for why he treated her differently that this record discloses is her selection as shop steward, and Paladino's desire not to deal with her in that capacity. This conclusion is more forcefully demonstrated by his prior treatment of Lisa Walden herself. As Paladino testified, several years ago, prior to any shop steward problem, Respondent discovered that Walden had made \$800 worth of phone calls in a tenant's office. For this conduct, which is clearly more serious a transgression than any of the incidents relied on by Respondent to discharge Walden here, she was merely issued a written warning. This evidence of disparate treatment involving Walden herself, but prior to any protected conduct, is highly significant evidence that her protected activities motivated her current discharge. *Pope Concrete*, supra at 990.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has not shown that it would have discharged Lisa Walden absent her protected conduct, and has thereby violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By interrogating its employees concerning their activities on behalf of Service Employees International Union Local 200C, AFL-CIO, CLC (the Union), and concerning their knowledge of or participation in the filing of unfair labor practice charges, withdrawing bargaining proposals

made to the Union in retaliation for the filing of unfair labor practice charges, and conditioning execution of a collective-bargaining agreement with the Union on the Union's withdrawing such charges, and by denying a pay raise to and suspending and discharging Lisa Walden because of her activities on behalf of the Union, and because of her exercise of other protected concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Lisa Walden, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In that connection, I reject Respondent's contention that Walden's postdischarge conduct disqualified her from reinstatement, and tolled her backpay as of September 8, when Respondent became aware of the fact that she had persuaded the DEC to change her security code. I do not credit Paladino's unsupported, equivocal, and unconvincing testimony that Respondent would have terminated Walden had it known of such conduct at the time. I note initially that Paladino's own testimony on cross-examination was uncertain on this issue, as he testified only that had Respondent known about the conduct in question earlier, it would have "taken some other action, or quicker action," not testifying that the action would necessarily have been discharge. Moreover, Respondent has not shown that it ever terminated or even disciplined any employee for engaging in such conduct. Additionally the individual code requirement was instituted by the DEC and was primarily for their benefit. Thus, it is unlikely that Respondent would have terminated Walden solely for changing her code, since the DEC had no objection to the change, and particularly in view of Respondent's demonstrated and admitted reluctance to fire any employee. Therefore I conclude as detailed above that the normal reinstatement and backpay remedy is appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, 10 Ellicott Square Corporation d/b/a Ellicott Development Company, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their activities on behalf of Service Employees International Union, Local

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

200C, AFL-CIO, CLC or concerning their knowledge of or participation in the filing of unfair labor practice charges.

(b) Withdrawing bargaining proposals previously made to the Union, in retaliation for the filing of unfair labor practice charges, and conditioning the execution of a collective-bargaining agreement with the Union on the Union's withdrawing such charges.

(c) Discharging, suspending, denying a pay raise to or otherwise discriminating against any employee for supporting the Union, or because the employee engaged in other protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lisa Walden immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Grant to Lisa Walden a pay raise of 15 cents per hour, retroactive to September 19, 1994.

(c) Remove from its files any reference to the unlawful discharge or suspensions of Lisa Walden and notify her in writing that this has been done and that the discharge or suspensions will not be used against her in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities, in Buffalo, New York, located at 295 Main Street, 270 Michigan Avenue, and 290 Main Street, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about your activities on behalf of Service Employees International Union, Local 200C, AFL-CIO, CLC or concerning your knowledge of or participation in the filing of unfair labor practice charges.

WE WILL NOT withdraw bargaining proposals that we have made to the Union, in retaliation for the Union's filing unfair labor practice charges, or condition our execution of a collective-bargaining agreement with the Union on the Union's withdrawing such charges.

WE WILL NOT discharge, suspend, deny a pay raise to, or otherwise discriminate against any of you for supporting the Union, or because you engage in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Lisa Walden immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Lisa Walden that we have removed from our files any reference to her discharge and her suspensions, and that the discharge and the suspensions will not be used against her in any way.

WE WILL grant a pay raise to Lisa Walden of 15 cents per hour retroactive to September 19, 1994.

10 ELLICOTT SQUARE COURT CORPORATION
D/B/A ELLICOTT DEVELOPMENT COMPANY